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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 207

LENA ROSENMAN AND THE NATIONAL CITY BANK OF NEW YORK, A CORPORATION, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF LOUIS ROSENMAN, DECEASED,
Petitioners,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

CHARLES ANGULO,
Counsel for Petitioners.

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CITATIONS.

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THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

Petitioners above named pray that a writ of certiorari issue to review the judgment [R. 18-19] of the Court of Claims of the United States entered in this cause on April 3, 1944.

Statement of Matter Involved and Question Presented.

This is an action against the United States to recover an overpayment of Federal estate tax in the amount of $23,-122.58. The Court of Claims held that *on the merits* plaintiffs would be entitled to recover the entire amount, but it

limited plaintiffs' recovery to $10,497.34 on the ground that as to the balance of $12,625.24 the plaintiffs' claim for refund was not timely filed with the Collector of Internal Revenue [R. 13-18]. Whether or not such refund claim was timely filed depends on the following question on which there is a conflict of decisions, namely: what is the legal status and effect of a remittance by a taxpayer to the Collector of Internal Revenue, *in advance* of his filing a tax return of any kind; or *in excess* of the tax shown in his return?

There appears to be no express authority conferred by the statute on Collectors of Internal Revenue to accept such remittances. However, it has long been the administrative practice for Collectors to accept them *not* as constituting the present "payment" of the tax but as being in the nature of a "deposit" to secure the payment of such tax as may be shown to be due in the tax return when filed, or as may be determined to be due by the Commissioner on the audit of the return. Accordingly, the administrative practice is to place such remittances to the *credit* of the taxpayer in a suspense account, one of which is known as Collector's Account #9, pending the filing or the audit of the tax return, as the case may be. When such return is filed or such audit completed, the amount standing to the credit of the taxpayer in Account #9 or other similar account is then applied by the Collector in payment of the tax shown in the return or in payment of the tax deficiency determined by the Commissioner, as the case may be, and an appropriate receipt is issued to the taxpayer showing such payment.

As long ago as April 14, 1933, the Comptroller General of the United States made a ruling in which he dealt with the nature of such a remittance and Collector's Account #9 (Vol. I, Prentice-Hall Tax Service, 1935, Special Re-

ports, par. 45). The case considered by the Comptroller General was quite similar to the present. The executors of an estate had secured an extension of time within which to file the Federal estate tax return, but prior to the expiration of such extension and before the filing of the return, they had remitted to the Collector of Internal Revenue the sum of $10,000 with which to pay such Federal estate tax as might be found to be due from the estate. The Comptroller General ruled that the remittance was a "deposit of $10,000 made in the nature of a cash bond to pay such taxes as might become due," and (referring to Collector's Account #9) he added that it "appears to have been so treated by the Collector of Internal Revenue who carried it in his accounts, not as a collection of taxes, but as a deposit for the payment of such taxes as might thereafter be found to be due."

Prior to the present case the Government's position before the courts has been the same as that of the Comptroller General in his said ruling. The Government's position was sustained by the Circuit Court of Appeals for the Third Circuit in the case of *Busser* v. *United States*, 130 F. (2d) 537 (1942), and by the District Court for the Southern District of New York in *Moses* v. *United States*, 28 F. Supp. 817 (1939). On the other hand, in *Atlantic Oil Producing Co.* v. *United States*, 35 F. Supp. 766 (1940), the Court of Claims rejected the Government's contention and held that the payment of the tax (and hence the "overpayment") takes place when such a remittance is originally made, notwithstanding that at that time neither the taxpayer nor the Government has as yet taken the requisite action to determine what amount, if any, is *claimed* to be due. These two lines of decisions expressly recognize that they are in conflict with each other.

Although in the above cited cases the question of whether such a remittance is a present "payment" of the tax or a "deposit" for its future payment, arose in a somewhat different form, namely, as to the Government's liability for interest on the refund thereof, the basic question was essentially the same as that here involved. The determinative event which sets the time running is the same, namely, the *payment* of the tax. Under Section 3771(a) of the Internal Revenue Code interest must be allowed on a tax refund from the date of the overpayment of the tax; under Section 910 of the same statute claims for refund must be filed within three years from such payment. The Court below treated its prior decision in the *Atlantic Oil Producing Co.** case, *supra*, as controlling in the present case [R. 15-16].

The facts in the present case are not in dispute. Practically all of them were formally stipulated, and as so stipulated were adopted by the Court below as its Special Findings of Fact [R. 6]. So far as material to the above question, such facts are as follows:

On December 24, 1934, the plaintiffs (having previously obtained an extension of time to February 25, 1935, in which to file the Federal estate tax return) remitted to the Collector of Internal Revenue the sum of $120,000. The covering letter to the Collector enclosing this remittance stated that it was "a payment on account of the Federal Estate tax" [R. 7, F. 3]. However, it also added that "* * * *it is contended by the executors that not all of this sum is legally or lawfully due*" 6 [R. 7, F. 3].

The Collector placed the remittance in Collector's Account #9 to the credit of the estate [R. 8, F. 5]. On February 25, 1935, the plaintiffs filed the Estate Tax return

* Italics supplied throughout unless otherwise expressly stated.

showing an estate tax due of $80,224.24 [R. 8, F. 5]. Such tax was then assessed and the assessment paid by the Collector crediting against the same $80,224.24 from the $120,000 which stood to the credit of the estate in Account #9 [R. 8, F. 5]. Thereupon the Collector issued to the plaintiffs a formal receipt showing said payment and that there remained a balance of $39,775.76 in said account to the credit of the estate [R. 8, F. 6]. This balance was so retained by the Collector with the plaintiffs' acquiescence, pending the audit of the Federal estate tax return by the Government [R. 8, F. 5].

The Government took almost three years to audit the return. Upon such audit the Commissioner determined that there was an additional tax due of $48,534.84 over and above the amount shown in the return [R. 8, F. 8]. In due course this additional tax was assessed and thereupon the Collector applied in part payment thereof the said $39,775.76 which then stood to the credit of the estate in Account #9. This occurred in April, 1938 [R. 9, F. 9]. The plaintiffs' claim for refund was filed on May 20, 1940, and thus concededly within three years from the date on which said sum of $39,775.76 was so applied [R. 9, F. 11]. The balance of said tax deficiency amounting with interest to $10,497.34 was paid by the plaintiffs on April 22, 1938 [R. 9, F. 9]. The judgment below allows the recovery of this last mentioned sum so that no question arises in respect thereof [R. 18].

The applicable statute (Section 319(b) of the Revenue Act of 1926, as amended by the Revenue Act of 1932) which is quoted in full in the annexed brief, provides that claims for refund of taxes shall be filed "within three years next after the payment of such tax." The court below held that even as to the said balance of $39,775.76 which stood to the credit of the estate in Collector's Account #9 as late as April, 1938, the "payment" of the tax occurred at the time

of the original remittance of $120,000 on December 24, 1934.

The Court held that the *whole* original remittance of $120,000 "was a payment of the amount of tax estimated to be due" [R. 15]. The Court based this conclusion on the statement in the letter of transmittal that the $120,000 was "a payment on account of the Federal Estate tax"; but the Court entirely disregarded the specific statement in said letter that "* * * it is contended by the executors that *not* all of this sum is legally or lawfully due" [R. 7, F. 3, last sentence].

It is apparent that the plaintiffs in their said letter did *not* purport to estimate the amount of the estate tax that was due. They expressly stated that the amount of the remittance was *in excess* of their estimate of the tax. Such estimate was furnished when the plaintiffs shortly thereafter filed with the Collector the estate tax return showing their computation of the estate tax to be $80,224.24. The tax return also served to supplement their letter in fixing the amount by which the remittance *exceeded* their estimate of the tax due. Thus, when the letter and the return are read together, their combined result was to inform the Collector that of the $120,000 remitted, $80,224.24 was in payment of plaintiffs' estimate of the tax and that the balance of $39,775.76 was *in excess* of such estimate and thus for deposit to their credit in Account #9 pursuant to the administrative practice we have explained. And this is precisely how the Collector actually treated the said remittance [R. 7-8].

Specification of Errors.

The Court of Claims erred:

I. In holding that except in respect of the $10,497.34 for which judgment was entered below, the plaintiffs' claim for refund was not filed within the three-year period prescribed by Section 319(b) of the Revenue Act of 1926, as

amended by the Revenue Act of 1932, and in limiting plaintiffs' recovery herein to said $10,497.34.

II. In holding that as regards the balance of $39,775.76 which remained to the credit of the estate in Collector's Account #9, pending the audit of the tax return, the payment of the tax within the meaning of said Section 319(b) took place at the time of the original remittance in December, 1934, and not in April, 1938, when said balance was applied by the Collector in partial payment of the additional tax which was then assessed.

III. In holding that the whole original remittance of $120,000 was transmitted by the plaintiffs to the Collector on December 24, 1934, as a payment of the amount of estate tax estimated by them to be due, and that the whole of such remittance when made was a payment of the tax within the meaning of said Section 319(b).

IV. In failing to hold that the said balance of $39,775.76 was retained by the Collector, with the plaintiffs' consent, as a deposit to secure the payment of any additional tax that might subsequently be found to be due upon the audit of the tax return.

Reasons for Granting the Writ.

I. There is a conflict of decisions. In *Busser* v. *United States*, 130 F. (2d) 537 (1942), decided by the Circuit Court of Appeals for the Third Circuit, the taxpayer prior to filing the Federal estate tax return sent to the Collector of Internal Revenue a check for $6,800, and in his letter of transmittal requested that the Collector "apply this on account of the tax in the above estate ultimately shown to be due by the Estate Tax Return when filed." The remittance was placed in Account #9 to the credit of the taxpayer. When the estate tax return was subsequently

filed showing a tax liability of $5,000.49, the Collector paid this amount from Account #9, leaving a balance of $1,799.51 in said account to the credit of the taxpayer. The question presented was whether the taxpayer was entitled to interest on the refund of this balance under Section 614 of the Revenue Act of 1928, which provides that "interest shall be * * * paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum." The Court of Appeals held that the said balance in Account #9 was not a tax payment and, accordingly, that no interest was allowable on the refund thereof. The Court of Appeals expressly recognized (p. 539, footnote) that its decision was in conflict with that of the Court of Claims in *Atlantic Oil Producing Co. v. United States*, 35 F. Supp. 766 (1940), on the authority of which the Court below based its decision in the present case.

The Government's position in the *Busser* case was similar to our contention in the case at bar. It stated in its brief (pp. 11-13):

> "On September 1, 1938, when the check was delivered [by the taxpayer], the tax was not yet due and payable, nor was the estate tax return yet due. When the check was received, the Collector, accordingly, was not yet a creditor, and, more important, he had no way of determining what the amount of the debt was or, indeed, whether there was in fact any debt due. Nor did either of the parties treat the transaction as a payment. Rather the trustee [i.e., the taxpayer], in delivering the check, simply requested the Collector to apply it 'on account of the tax * * * ultimately shown to be due by the Estate Tax Return when filed,' and, in turn, the Collector did not give a receipt on the usual form used for tax payment. Instead, the Collector acknowledged receipt of Price's [the taxpayer's] letter and promised a receipt upon the filing of the return, and, significantly, he treated the check not as a normal tax payment but credited it to Unidentified Account

(Account 9). *It is, therefore, abundantly clear, from the parties' own treatment of the transaction that the mutual intention requisite to constitute payment was absent here.*

* * * * * * *

"* * * Rather, the transaction was in the nature of a cash bond to secure or protect the liability of decedent's estate and to forestall the running of interest against it. * * *"

In *Moses* v. *United States*, 28 F. Supp. 817 (1939), decided by the District Court for the Southern District of New York, the taxpayer before filing the estate tax return for the estate sent to the Collector of Internal Revenue a check for $20,000, stating in his letter of transmittal that it was "to apply on account of the Federal Estate Tax liability of the decedent." The remittance was placed to the credit of the taxpayer in Account #9. Thereafter the tax return was filed showing a tax liability of $9,612, and later an additional tax was determined to be due of $2,447.98. These two amounts were paid by the Collector out of the said $20,000 in Account #9, leaving a balance in said account to the credit of the taxpayer of $7,940.02 which in due course was refunded to the taxpayer without interest. The question presented was as to the Government's liability for interest on such refund. In holding that no interest was allowable the Court said at p. 819:

"The excess contained in this taxpayer's deposit was, in no sense, either payment or overpayment but a deposit made to suit his own convenience."

The *Moses* case was cited with approval by the Circuit Court of Appeals for the Third Circuit in *Busser* v. *United States, supra*, (p. 539, n. 9); on the other hand, it was expressly disapproved by the Court of Claims in *Atlantic Oil Producing Co.* v. *United States, supra*, (p. 768) on the

authority of which the Court below based its decision in the present case [R. 15-16].

II. The question here involved is important in the administration of the Internal Revenue laws and has not been, but should be, decided by this Court. From the standpoint of the Government, there is an obvious advantage in having taxpayers make deposits with it, in order to secure the future payment of any additional tax that may be found to be due on the audit of their returns. The decision below would tend to discourage taxpayers from making such deposits. For it casts upon such taxpayers the burden and consequent risk of keeping track of the time consumed by the Government in auditing their returns. It would, therefore, seem to be highly desirable in the administration of the Internal Revenue laws that the true status of such remittances be clarified and definitely determined by this Court.

Furthermore, as indicated above, the Government in every case prior to the present one, has taken the position that such remittances are deposits in the nature of a cash bond and do not actually become tax payments until subsequently applied in payment of the tax shown in the tax return or in payment of a tax deficiency determined by the Commissioner. The Government in the present case has taken a position diametrically opposed to that which it has urged upon the courts in the past. It is respectfully submitted that it is not in the public interest that the Government be in a position to argue inconsistently in respect of the self same type of remittance that in one case it is a tax payment and in another, a "deposit," depending on which of these alternatives happens to be most unfavorable to the individual taxpayer. Whatever the correct view may be as to the true status of such remittances, it should apply

to all taxpayers alike and in all courts. This requires that the question involved be settled and finally determined by this Court.

Wherefore, it is respectfully submitted that this petition should be granted.

CHARLES ANGULO,
Counsel for Petitioners.

June, 1944.

BRIEF IN SUPPORT OF THE PETITION.

Opinion Below.

The opinion of the Court of Claims is reported in 53 F. Supp. 722.

Jurisdiction.

The judgment of the Court of Claims was entered on April 3, 1944 [R. 19]. The jurisdiction of this Court rests on Section 3 of the Act of February 13, 1925 (c. 229, 43 Stat. 939).

Statement.

A statement of the facts and of the questions involved and of the assignment of errors will be found in the petition.

Statute Involved.

Section 319(b) of the Revenue Act of 1926, as amended by Section 810 of the Revenue Act of 1932 (47 Stat. 169), which as so amended provides as follows:

> "All claims for the refunding of the tax imposed by this title alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund."

ARGUMENT.

The above quoted statute does not bar the plaintiffs from recovering the full amount of $23,122.58 herein claimed.

It seems to us apparent that in enacting the above statute Congress did not intend to preclude a taxpayer in a situation like that in the present case, from recovering money

due to him from the Government. The reason for the statute is plain. Without some such statute the Government could never know what portion of the taxes collected, definitely belonged to it. Thus, the orderly administration of the public finances would be impossible. The reason and purposes of the statute are wholly inapplicable to a situation like the one in the present case. Here the balance of $39,775.76 which remained in Account #9 pending the audit of the return, was being held by the Government during that period, *not* as moneys which belonged to it or to which it claimed to be entitled, but, on the contrary, as moneys which belonged to the plaintiffs and which the Government was holding with their consent, for their account and to their credit. Not until April, 1938, when it was applied in partial payment of the tax deficiency which was then assessed, was the said balance carried in the Government's accounts as a tax collection.

So long as said balance remained in Account #9 to the credit of the plaintiffs, there was no need or occasion for them to notify the Government of their claim of ownership. Such ownership was not disputed; it was acknowledged by the Government and shown on its own records. It seems incredible that under such circumstances Congress would have wished to penalize a taxpayer for his commendable conduct in cooperating with the Government by allowing it to retain his money as security for the payment of any additional tax that might be found to be due from him upon the audit of his return.

Moreover a "payment" can only result from the mutual agreement of the parties. *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139. During the period that the said balance of $39,775.76 stood to the credit of the plaintiffs in Account #9 and until the final audit of the tax return, neither party, that is to say, neither the Government nor the plain-

tiffs, claimed that there was any additional tax due or owing by the latter. The plaintiffs had filed their tax return fixing the amount of the tax claimed by them to be due at $80,224.24, which sum had been duly paid. Therefore, so far as they were concerned, their tax liability had been fixed and satisfied. On the other hand, although the Government was still engaged in auditing the return, it had not yet challenged or questioned plaintiffs' determination of their own liability. As the matter then stood, therefore, neither party was claiming that any additional sum was due. Therefore, it is difficult to see how the said balance of $39,775.76 while in Account #9 could be regarded as a "payment" of something which neither party then considered to be due.

Respectfully submitted,

CHARLES ANGULO,
Counsel for Petitioners.

June, 1944.